

NUTRITIONAL SUPPORT, INC.,)	AGBCA No. 2002-141-1
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Appellant)	
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RULING ON JURISDICTION

December 19, 2002

Before POLLACK, VERGILIO, and WESTBROOK, Administrative Judges.

Opinion for the Board by Administrative Judge WESTBROOK.

The Board received this appeal on behalf of Nutritional Support, Inc. of Decatur, Georgia (Nutritional Support or the institution), on August 2, 2002. The Notice requested an evidentiary hearing to appeal an adverse decision of the Child Nutrition Division (CND) of the U. S. Department of Agriculture's (USDA) Food and Nutrition Service (FNS) terminating Nutritional Support from the Child and Adult Care Food Program (CACFP). The Notice also stated that Nutritional Support had a contract with the Georgia State Office of School Readiness (OSR) which administers the program in Georgia. The appeal was docketed. However, the docketing letter informed the parties that an initial review caused the Board to question whether it had jurisdiction in the matter. Parties were allowed 30 days in which to address the question of jurisdiction. Both parties responded. Thereafter, the Board requested additional briefing on an issue raised by Nutritional Support, i.e., whether the Board has jurisdiction to hear the appeal under 7 CFR 24.4(c) dealing with debarment.

Based on the reasoning set out below, the Board concludes that it lacks jurisdiction to decide the appeal.

FINDINGS OF FACT

1. The CACFP is authorized by law (Section 17 of the National School Lunch Act, 42 U.S.C. ' 1766). The program provides cash reimbursements and commodity foods for meals served in child and adult day care centers, and family and group day care facilities for children. USDA oversees the program through its FNS, which administers the program in partnership with states. The general purpose and scope of the program authorizes assistance to states through grants-in-aid and other means to initiate, maintain, and expand nonprofit food service programs for children and adult participants in non-residential institutions which provide care. 7 CFR 226.1. The institution and Georgia OSR executed a CACFP Institution Agreement and Policy Statement for FY 2000. Nutritional Support agreed to accept financial and administrative responsibility for management of an effective food service program and to comply with CACFP regulations (7 CFR 226). (Exhibit to Notice of Appeal.)
2. Those CACFP regulations provided the following, in pertinent part, regarding the termination of institutions from the program:

The State agency shall not enter into an agreement with any applicant institution which the State agency determines to have been seriously deficient at any time in its operation of any Federal child nutrition program. . . . The State agency shall terminate the program agreement with any institution which it determines to be seriously deficient. However, the State agency shall afford any institution every reasonable opportunity to correct problems before terminating the institution for being seriously deficient. The State agency shall notify FNS whenever it has denied an application from or terminated the participation of a seriously deficient institution. This notification shall be made within 15 days of the review officials=s decision upholding the State=s action or, if the institution elects not to appeal the decision, within 15 days of the expiration of the appeal right. FNS will maintain a list of these institutions and will notify all other State agencies of these institutions=ineligibility to participate in the program. FNS may determine independently that an institution has been seriously deficient in its operation of any Federal child nutrition program and include such institution on the list of ineligible institutions if appropriate corrective action is not taken. State agencies shall not enter into an agreement with any institution included on this list of ineligible institutions and shall terminate any participating institution included on the list within 30 days of the receipt of notification by FNS of the institution=s ineligible status. Once included on this list, an institution shall be ineligible to participate in the program until such time as FNS, in consultation with the appropriate State agency, determines that the serious deficiency which resulted in the ineligible status has been corrected. . . . Denial or termination actions taken on the basis of FNS notification of ineligible status shall not be subject to administrative review as provided in ' 226.6(k). However, an institution which FNS has determined to be seriously deficient and which has not taken acceptable corrective action may request an administrative review of this

determination by an FNS review official in accordance with the appeal procedures set forth in ' 226.6(k) and will not be included on the list of ineligible institutions unless FNS's determination is upheld by the review official.

(7 CFR 226.6(c) (emphasis added).)

3. During the course of the agreement, Nutritional Support's books and records were audited pursuant to 7 CFR 226.6(i)(5). The audit resulted in adverse findings which led Georgia OSR to terminate the institution from the program, deny its applications for FY 2001, and request repayment of program funds previously paid. Nutritional Support was afforded an evidentiary hearing before the Georgia Office of State Administrative Hearings (OSAH). The Administrative Law Judge (ALJ) who heard the matter affirmed the findings of OSR on August 30, 2001. The institution was informed of its right to seek review of the ALJ's decision. The OSR Administrative Review Officer reviewed the record and the institution's allegations of error and affirmed the decision of the ALJ in a decision dated November 28, 2001. Application for Discretionary Appeal was made to the Court of Appeals of Georgia and was denied in an Order dated April 22, 2002. (Exhibits A - C to Government's Motion.)

4. Thereafter, on May 28, 2002, Nutritional Support met with representatives of the CND. The meeting is referenced in a July 12, 2002, letter from the Director of CND to the institution. The Director informed the institution that he had reviewed its documentation and after review, had concluded that the actions of the State agency were in compliance with the regulatory requirements. He further stated that Nutritional Support had been placed on FNS's National Disqualified List. By letter of August 14, 2002, the institution, through counsel, wrote the USDA Food and Nutrition Service requesting an evidentiary hearing to appeal the determination that the institution was seriously deficient in the administration of CACFP. The Director, CND, responded in an August 15, 2002, letter stating that the legislation and regulations governing CACFP make no provision for an evidentiary hearing and that the request was therefore denied (Exhibit C to Nutritional Support, Inc.'s Brief in Opposition to Government's Motion to Dismiss for Lack of Jurisdiction). Neither party cited changes to the law and implementing regulations, 67 Fed. Reg. 43,448 (2002) (interim rule, effective date July 29, 2002). Nutritional Support is now on the new National Disqualified List, with the interim procedures applicable to its readmittance to the program, 67 Fed. Reg. 43,462.

DISCUSSION

In its initial response, Nutritional Support contended that the Board has jurisdiction under the Contract Disputes Act (CDA), 41 U.S.C. ' ' 601-613, as amended, because the dispute arises from a decision of a USDA officer with respect to a contract between USDA and OSR and with respect to a contract between Nutritional Support and the USDA through its state agent. Alternatively, Nutritional Support argued that the Board has jurisdiction pursuant to 7 CFR 24.4(c) because Nutritional Support has been suspended and debarred by an authorized official of USDA. In response to the Board's request for further briefing on the issue of the Board's 7 CFR 24.4(c) debarment jurisdiction, Nutritional Support referred to 7 CFR 3017 pertaining to Governmentwide

Suspension and Debarment (Nonprocurement) which governs suspension and debarment of participants in Federal nonprocurement transactions. Nutritional Support argued that CACFP is a covered transaction within the meaning of 7 CFR 3017. Nutritional Support also repeated its earlier argument that the Board has CDA jurisdiction to decide the appeal. Nutritional Support bases this argument on what it terms two agreements with USDA: (1) the USDA agreement with OSR and (2) An agreement between USDA and Nutritional Support, both an express contract through the OSR/Nutritional Support Agreement and through an implied contract between USDA and Nutritional Support that arises by implication of law.@ Nutritional Support contends that the Board has jurisdiction because the disputes arise under these contracts with USDA. Nutritional Support again argues that it is a third-party beneficiary of the express contract with USDA. Finally, the institution cites to Georgia Code, O.C.G.A. ' 20-1A-4 which empowers OSR to act as the agent of the federal government in conformity with that chapter of the Georgia code and to administer any federal funds granted to the state to aid in the furtherance of any functions of the office.

The initial Government Motion to Dismiss for Lack of Jurisdiction argued (1) that the contract between National Support and OSR is not subject to the CDA and thus not within Board jurisdiction; (2) that OSR is not a federal executive agency, but a part of Georgia state government; (3) Nutritional Support's contract is not with USDA and USDA has no contract with Nutritional Support; and, (4) USDA's role was to provide grant funds to Georgia for reimbursement of meals as a part of the program. In response to the Board's request for supplemental briefing, the Government filed a Second Government Motion to Dismiss for Lack of Jurisdiction. Therein, the Government argues that a debarment within the scope of 7 CFR 24.4(c) and 48 CFR 409.470 presupposes the existence of a contract with USDA. The Government also contends that no debarment excluding Nutritional Support from Government contracting and Government-approved contracting has taken place. In so arguing, the Government cites to 48 CFR 9.406 and 409.406, dealing with the federal acquisition and agriculture acquisition systems, respectively. The Government argues that Nutritional Support's inclusion on the National Disqualified List for CACFP excludes it from participation in that program and not from all Government contracting. Thus, according to the Government's argument, the Board has no jurisdiction to hear the appeal as its 7 CFR 24.4(c) jurisdiction is limited to appeals by contractors debarred from Government contracting by USDA debarring officials.

The Board is a forum of limited jurisdiction. That jurisdiction is limited to four areas: (1) CDA appeals; (2) appeals of final administrative determinations of the Federal Crop Insurance Corporation; (3) issues and appeals related to certain suspensions and debarments or which actions under 48 CFR 409.470 are one; and (4) appeals of administrative determinations of liquidated damages under the Contract Work Hours Safety Standards Act. Before us here are the issues whether the Board has either CDA or suspension and debarment jurisdiction over this appeal.

Does the Board Have Jurisdiction Under Contract Disputes Act?

The CDA grants contractors the right of appeal to an agency board of contract appeals. The CDA which applies to a variety of express or implied contracts entered into by an executive agency,

defines Acontractor® as a party to a Government contract other than the Government. 41 U.S.C. ' ' 601, 602. What is lacking here is a contract between the institution and an executive agency of the federal Government. The agreement underlying this dispute was entered into between Nutritional Support and an agency of a state, not an executive agency of the federal Government.

Various boards of contract appeals have held that for a contract to come within the scope of the CDA, it must be a federal procurement contract for the direct use or benefit of the federal Government. West Chester Savings Bank, AGBCA No. 83-278-1, 84-1 BCA & 17,077; Skip Kirchdorfer, Inc. and Osage Estates, Ltd., A Partnership, HUDBCA No. 83-812-C17, 85-1 BCA & 17,836. The CDA does not apply to contracts which are only tangentially connected with government procurement of goods and services. Coastal Corp. v. United States, 713 F.2d 728, 730 (Fed. Cir. 1983). Nutritional Support's agreement was with an agency of the State of Georgia. While there was federal involvement with the agreement, even extensive federal involvement does not confer Board jurisdiction regarding disputes arising under such a non-federal instrument. CDK Contracting Co., ASBCA No. 44997, 93-3 BCA & 26,068. Here CND provided grant funds to the state to be used under its agreement. The Board lacks jurisdiction over a contract entered into by other than an executive agency even when the contract is based on a grant of federal money. Raji Abdus-Salaam, AGBCA No. 99-106-1, 99-1 BCA & 30,235.

The state's administration of the CACFP in a given locality does not here create a procurement contract between the federal and state governments as contemplated by the CDA. In its agreement with the state, the federal Government does not acquire property or services for the direct benefit or use of the federal Government. Therefore, a procurement contract between the Government and state has not arisen. 31 U.S.C. ' 6303. Consequently, there is no basis to conclude that a procurement contract under the CDA has arisen between the federal Government and an institution entering into an agreement under the CACFP.

Nutritional Support argues that it was an intended third-party beneficiary of the agreement between USDA and OSR. The third party beneficiary theory does not provide jurisdiction because there is no qualifying CDA contract. The USDA did not enter into a procurement contract with the state. By statute, an executive agency is to use a procurement contract as the legal instrument reflecting the relationship between the United States and a state when the principal purpose of the instrument is to acquire property or services for the direct use of the United States Government. 31 U.S.C. ' 6303. Because USDA did not employ such an instrument, and no such instrument can be implied to exist under the facts, no CDA contract arose. In contrast to contracts, grants and agreements are vehicles distinct from procurement contracts for the use of the Government. 31 U.S.C. ' ' 6304, 6305. Absent an underlying contract subject to the CDA, Nutritional Support's theories of privity and of the state being an agent of the federal Government fail.

Even were we to find the agreement between OSR and CND to be one within the scope of the CDA, we would then have to consider whether that status granted standing to bring an appeal to the Board as a third-party beneficiary. To allow one to sue as a third-party beneficiary of a contract to which he is not a party, the contract must reflect the intent to directly benefit the third party. German Alliance Insurance Co. v. Home Water Supply Co., 226 U.S. 220, 230, 333 S. Ct. 32, 35, 57 L. Ed.

195 (1912). We need not resolve that question and other issues relating to third-party beneficiaries as we find a lack of jurisdiction due to the absence of a qualifying procurement contract.

Does the Board Have Jurisdiction to Decide the Appeal Under 7 CFR 24.4(c)?

By regulation, 7 CFR 24.4(c), the Board has three specific grants of jurisdiction to decide appeals of suspension and debarment. Two are unequivocally irrelevant to this appeal as one pertains to the Commodity Credit Corporation and the other to timber sales contracts. The third is jurisdiction of appeals regarding persons suspended or debarred by an authorized official of the Department of Agriculture under 48 CFR 409.470.

Title 48, chapter 4 of the Code of Federal Regulations pertains to policies and procedures for acquisitions by contracting agencies within USDA supplementing Title 48, chapter 1. The Board's jurisdiction to decide suspension and debarment appeals arising under that title, is therefore limited to those concerning suspending or debaring a contractor from contracting with USDA activities for supplies and services. The July 12, 2002, letter from the Director of CND to Nutritional Support is not a notice of debarment from contracting with USDA for the acquisition of supplies and services (Finding of Fact (FF) 4). The Board has no jurisdiction to hear appeals from suspensions and debarments other than the three here outlined. We make no finding whether the letter relied on by Nutritional Support constituted a debarment of any sort. We do find that it does not constitute a debarment from participating with USDA in acquisition contracts, and as such, under 7 CFR 24.4(c) the Board does not have jurisdiction to hear this appeal.

In support of its argument that the Board has jurisdiction pursuant to 7 CFR 24.4(c), because Nutritional Support has been suspended and debarred by an authorized official of USDA, the institution provides a discussion of 7 CFR 3017 setting out procedures for the Government-wide Debarment and Suspension program for non-procurement activities. It is unnecessary for us to delve deeply into this argument for two reasons. The first is that, as explained above, we find that our 7 CFR 24.4/48 CFR 409.470 jurisdiction pertains to debarments and suspensions from contracting with USDA for the acquisition of supplies and services. The reference in 7 CFR 24.4(c) to 48 CFR 409.470 and the stated purpose of Part 401, Agriculture Acquisition Regulation System (to implement the Federal Acquisition Regulation (FAR) and to be used in conjunction with it) limits our jurisdiction to decide debarments under 48 CFR 409.470 to debarments from acquisition contracting.

In addition, we reject the argument that 7 CFR 3017 and the following paragraphs cited by the institution grant us jurisdiction to hear an appeal from a debarment from a non-procurement activity because 7 CFR 3017.515 provides a right of appeal to the Office of Administrative Law Judges (OALJ). Nutritional Support's cite to this non-procurement regulation does not further its contention that the Board has jurisdiction to entertain an appeal under our jurisdiction to adjudicate suspension and debarments under the FAR. Rather, it supports the contrary position.

RULING

The appeal is dismissed for lack of jurisdiction.

ANNE W. WESTBROOK
Administrative Judge

Concurring:

HOWARD A. POLLACK
Administrative Judge

JOSEPH A. VERGILIO
Administrative Judge

Issued at Washington, D.C.
December 19, 2002